United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with Appendix of Appellee

76-1068

B
P/S

To be argued by
JOHN L. CADEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1068

UNITED STATES OF AMERICA,

Appellee,

—*against*—

ROBERTO ORTEGA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney
Eastern District of New York.

PAUL B. BERGMAN,
JOHN L. CADEN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1068

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERTO ORTEGA,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Roberto Ortega appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Bramwell, *J.*), on February 6, 1976, after a jury trial, convicting him of possessing $2,060, a portion of the proceeds of the robbery of the Chase Manhattan Bank branch office located at 55-55 58th Street, Maspeth, New York in violation of 18 U.S.C. § 2113(c).[1]

Appellant was sentenced to ten years and is presently in federal custody.

---

[1] The defendant was acquitted of two other counts in the indictment charging him with this bank robbery (18 U.S.C. § 2113(a)) and of assault by use of a dangerous weapon during the commission of this offense (18 U.S.C. § 2113(d)). The proceeds of the robbery totaled $14,860.

On this appeal, appellant does not challenge the sufficiency of the evidence against him, but instead argues (1) that a substantial amount of cash taken during the bank robbery, along with a loaded .357 magnum revolver, and a pouch of bullets which were seized at the time of his arrest should have been suppressed since the arrest as well as the search following the arrest were unlawful and (2) that the sentence imposed by the trial judge was "excessive".

Statement of Facts

The relevant facts, as developed during the suppression hearing and at appellant's trial, are as follows:[2]

At approximately 10:20 A.M., on October 23, 1975, three masked men robbed the Chase Manhattan Bank, 55-55 58th Street, Maspeth, Queens, of approximately $14,860 (34). Two of the robbers, brandishing their pistols, stood guard over the bank's tellers and customers, while a third robber, leaped over the teller's counter (31). Several minutes later, after emptying the cash drawers into his bag, the third robber revaulted the teller's counter and along with his two accomplices exited the bank. The three robbers entered a getaway car, driven by a fourth man, and sped away (8-15). As luck would have it, a passerby became suspicious of these men and wrote down the license plate number of the getaway car—NY 922ZEA (8-15).

Witnesses described two of the robbers as young black males in their twenties, approximately 5′ 8″ to 5′ 9″ tall

---

[2] For the most part, page references in parenthesis refer to the minutes of the suppression hearing held on December 10, 1975. To the extent that reference must be made to the trial minutes, specific designation will be made in the parenthesis.

and weighing about 150 pounds (17). All information concerning the getaway car and the physical description of the robbers was given to FBI Special Agent Paul Cavanagh and other FBI agents when they arrived at the bank shortly after the robbery (18).

Sometime before 11 A.M. that morning, New York City detectives located the getaway car—NY 922ZEA—on the street in front of appellant's residence at 2407 100th Street in East Elmhurst, New York, a short distance from the bank (18-19). One of the detectives touched the hood of the getaway car which was still warm (19). About a half hour later, at approximately 11:30 A.M., appellant left his residence carrying a brown leather jacket over his arm. He entered the getaway car and began to drive away (25). By this time, Agent Cavanagh had arrived and observed that appellant, a young black male in his twenties fitted the description of two of the robbers, in that, appellant is approximately 5′ 9″ tall and weighs about 150 pounds (21). After appellant had driven only a short distance Cavanagh and two New York City Detectives pulled alongside appellant's car and directed him to stop (22). After appellant stopped, he was ordered out of his car and placed under arrest for bank robbery. An immediate search of his person revealed that a "bulging" pants pocket contained monies wrapped in Chase Manhattan bank wrappers and taken during the bank robbery (25, 32).

FBI Agent Cavanagh then entered appellant's car, where he observed a brown jacket lying on the front seat (25). This was the same jacket that Cavanagh observed appellant carrying when he left his residence. A search of this jacket revealed additional monies wrapped in Chase Manhattan wrappers and taken during the course of the robbery. In addition, a pouch containing bullets was also found in the jacket (25). Cavanagh

seized the money and the wallets and then drove appellant's car back to his residence where he locked the car (23-26). Before securing the car, however, Cavanagh checked the glove compartment and found a loaded .357 magnum revolver which he seized (26). At this time, Cavanagh did not search any area of the car other than the glove compartment (36).

After his arrest, appellant was interviewed by FBI Agent Joseph Martinolich (43-63). Appellant advised Martinolich that he did not participate in any bank robbery and that he was at home that morning. Appellant also told Martinolich that he rented the car (NY 922ZEA) he was driving several days before and that the car had been in front of his residence that entire morning. Finally, appellant claimed that the money found in his pants pocket and jacket had been given to him the night before on October 22nd by a man named "Pacheko" (51-52). When Agent Martinolich advised appellant that the Chase Manhattan bank robbery occurred the morning of October 23rd, appellant quickly changed his story and said that "Pacheko" had given him the money on the morning of October 23rd (52-53). Appellant provided no further information concerning "Pacheko's" identity or whereabouts (Tr. Trans. Sec. [illegible], p. 172).

Finally, there was expert testimony offered by the government at trial which tended to prove that the left sneaker worn by appellant at the time of his arrest was the same sneaker that the robber who vaulted the teller's counter wore (Tr. Trans. Dec. 12, pp. 132-39). FBI Agent Arthur Hegvold testified that the sole of appellant's left sneaker was similar in size, design and general conditions of wear as the imprint of the robber's sneaker as lifted from the teller's seat (Tr. Trans. Dec. 12, pp. 137-38).

ARGUMENT

POINT I

The evidence seized from appellant's person and from the car that he was driving at the time of his arrest was properly admitted into evidence.

Although Point I of appellant's brief is not as explicit as it might be, we take appellant to contend that all of the evidence that was seized from his person and his car at the time of his arrest should have been suppressed as the product of an unlawful search and seizure. Thus, at issue on this appeal is the validity of (1) the seizure of a bulge from appellant's pants pocket which turned out to be a substantial amount of cash taken from the bank; (2) the seizure of additional monies from appellant's jacket which was found on the front seat of the car which he was driving; and (3) the seizure of the .357 magnum revolver from the glove compartment of the car.[4]

Appellant's sole point with respect to the foregoing seizures is that the officers and agents did not have probable cause to arrest him. Appellant does not claim, alternatively, that the searches were invalid for any other reason apart from the claimed invalidity of the arrest. We believe that there was ample reason to arrest appellant; indeed, any argument to the contrary would be

---

[4] In the district court appellant's motion to suppress was not made on papers. Instead, shortly before the trial was to commence, appellant's desire to suppress the evidence in this case was orally made known to District Judge Bramwell. At that time, the United States did not object to either the lack of notice with respect to the motion nor to the lack of specificity. On the latter point, it was assumed that the appellant intended to suppress any and all of the evidence which was taken at or around the time of his arrest (12).

frivolous. It goes without saying of course, therefore, that the discovery of the money in appellant's pants pocket was perfectly appropriate. We believe as well that the subsequent search of the car which uncovered the additional cash in th jacket lying on the front seat and the gun in the glove compartment were entirely proper in scope.

1. The Arrest and Search of Appellant's Person

Appellant was arrested approximately one hour after the bank robbery occurred. When appellant left his residence, the arresting agents observed that Ortega was a young black male in his twenties who stood approximately 5′ 9″ tall and weighed about 150 pounds. This, of course, was precisely the description that the agents were furnished by witnesses with regard to the physical description of two of the robbers. Additionally, after appellant left his residence, he entered what, unquestionably, was the getaway car and drove away. All the information then available to the arresting agents gave them more than ample probable cause to conclude that appellant's rented car was used in the robbery and that he was one of the robbers. Appellant's arrest was unquestionably lawful. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925); *Draper* v. *United States*, 358 U.S. 307 (1959).

2. The Search of the Car

After appellant entered the getaway car, he drove a short distance before his car was pulled over and he was arrested for bank robbery. Appellant's person was searched immediately after he was arrested. The agents observed that one of his pants' pockets was bulging. A search of that pocket revealed monies taken during the

course of the robbery. Clearly, the search of appellant's pants pocket was a classic illustration of a search incident to a lawful arrest. *Chimel* v. *California*, 395 U.S. 752 (1969); *Gustafson* v. *Florida*, 414 U.S. 260 (1973); *United States* v. *Robinson*, 414 U.S. 218 (1973).

At the time appellant's pants pocket was searched, he was standing several feet from the getaway car. The agents had reason to believe that this particular car was used in the robbery and that appellant was a participant in an armed bank robbery that had occurred only an hour before. Clearly, they had good reason to believe that appellant was armed and therefore dangerous. The agents also had reason to believe that appellant's car which was parked only several feet away was an area into which he might reach in order to grab a weapon or destructible evidence. The law is clear that when an arrest is made, it is reasonable for the arresting officers to search the person arrested as well as the area in which an arrestee might reach in order to grab a weapon or destroy evidence. *Chimel, supra.* Under these circumstances, it was reasonable for Agent Cavanagh to search appellant's jacket and later to search the glove compartment in the car as incident to his arrest. *United States* v. *Edmonds*, — F.2d — (2d Cir. Slip op. 3551, 3562; May 7, 1976); *United States* v. *Stevens*, 509 F.2d 683 (8th Cir. 1975); *United States* v. *Lewis*, 504 F.2d 92 (6th Cir. 1974).

Finally, the Government contends that this search was also lawful under the "automobile exception" to the warrant requirement.

The standards for determining when a warrantless search of a vehicle is permissible have been articulated and refined many times by the Supreme Court and by the various Circuit Courts. Though the threshold re-

quirement of probable cause must always be met, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970). The fact that the object to be searched is an automobile does not obviate the need for a search warrant, even when probable cause clearly exists. "Exigent circumstances", generally related to the mobility or potential mobility of the vehicle, must be shown to render the search "reasonable." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 459-460 (1971); *United States* v. *Young*, 489 F.2d 914, 915-916 (6th Cir. 1974).

The Government respectfully submits that first, probable cause to search the vehicle did in fact exist; and, second, that despite the fact that appellant was in custody, the possibility that the vehicle might be moved or tampered with, and the lack of sufficient "manpower" to effectively secure the vehicle, provided the exigent circumstances necessary to justify its immediate search.

When Cavanagh searched appellant's jacket and the glove compartment of his car, he knew that other accomplices to the bank robbery were still at large. It was therefore quite reasonable for Cavanagh to search, especially, when he knew that there were others who would be interested in the getaway car and its contents. Exigent circumstances were present when Cavanagh searched appellant's jacket and the car's glove compartment. Indeed, having recovered but a portion of the robbery proceeds from appellant, the agents could reasonably have anticipated that additional moneys remained in the getaway car.

This Court has determined that the possibility that accomplices of an arrestee might tamper with or move a vehicle, even where a vehicle is parked, *United States*

v. *Ellis*, 461 F.2d 962, 966 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972) or where it is not even entirely certain that "accomplices" exist, *United States* v. *Carneglia*, 468 F.2d 1084, 1089-1090 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973), might give rise to the exigent circumstances which would justify the warrantless search of a car. In this case, such exigent circumstances clearly existed.

Alternatively, we submit that the arresting agents had probable cause to believe that appellant's rented auto was subject to seizure on the grounds that it was used to transport and conceal contraband incident to a bank robbery. Title 49, U.S.C. §§ 781, 782; see *United States* v. *Powell*, 407 F.2d 582, 583-84 (4th Cir. 1969), *cert. denied*, 395 U.S. 966. The law in this Circuit is well settled that where there is probable cause to seize an automobile pursuant to statutory authority, a warrantless search is proper. *United States* v. *Zaicek*, 519 F.2d 412, 414 (2d Cir. 1975); *United States* v. *LaVecchia*, — F.2d — (2d Cir. 1975); *United States* v. *Capra*, 501 F.2d 267, 280 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Francolino*, 367 F.2d 1013 (1966), *cert. denied*, 386 U.S. 960 (1967).

POINT II

Appellant's sentence was proper and not subject to review.

Appellant was sentenced to ten years in jail which he is presently serving. Appellant contends that his sentence was "excessive" and requests that his sentence be vacated and his case be remanded to the District Court for resentencing (Appellant's Brief, page 7). Appellant claims that his sentence was excessive for three reasons:

(1) that the trial judge sentenced appellant as if he participated in the bank robbery (2) that the sentence was excessive in light of appellant's "minor arrest record" and (3) the presentence report improperly included information that appellant was suspected by the FBI to have participated in 12 to 20 other bank robberies.

It is common ground that a sentence imposed by a federal district judge, if within statutory limits is generally not subject to review. *United States* v. *McCord*, 466 F.2d 17, 18-19 (2d Cir. 1972); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972). This court has specifically held that it will not review a defendant's sentence on the ground that it was excessive. As this court stated in *United States* v. *Brown*, 479 F.2d 1170, at 1173 (2d Cir. 1973):

> Clarification has been required only under circumstances . . . where a sentence was imposed upon the basis of (1) misinformation of constitutional magnitude, such as an inaccurate criminal record, *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), (2) a record comprising prior unconstitutional convictions, e.g., *United States* v. *Tucker*, 404 U.S. 443 (1972), (3) the effect of a simultaneous sentence and conviction upon a more serious count of the indictment, which was later invalidated, *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972), or 94) failure of the court to receive and consider mitigating circumstances, *United States* v. *Malcolm*, 432 F.2d 808, 818 (2d Cir. 1970).

On appeal, appellant raises none of these extraordinary circumstances in seeking review of his sentence.

It should be noted in passing, that appellant does not have a "minor" arrest record as stated in his Brief at page 7. Excluding his arrest in the present case, appellant who is only 25, has been arrested on at least 10 other occasions for criminal offenses including assault, burglary, robbery, possession of unlawful firearms and narcotics (see appellant's presentence report, pages 5-8 which has been sent to this Court under separate cover). These prior arrests as well as the information concerning the FBI's belief that appellant was involved in other bank robberies was properly included in the presentence report. *Williams* v. *New York*, 337 U.S. 341, 1949; 18 U.S.C. § 3577, enacted 1970.

It is equally clear that the trial judge viewed appellant's crime in the same light as defense counsel who at the time of sentencing candidly observed—"I know the crime is a vicious crime"—(Sentencing Minutes, Feb. 6, 1976, p. 5). There is no question but that at the time of sentencing, the trial judge was familiar with all the evidence adduced at trial and that the court did not misunderstand appellant's situation or impose his sentence for inappropriate reasons.[5] The trial judge knew precisely who was before him at the time of sentencing. See *United States* v. *Herndon*, 525 F.2d 200 (2d Cir. 1975).

The trial judge's sentence was proper and it is not subject to review.

---

[5] Of course, it would have been entirely proper for Judge Bramwell to consider the evidence pointing to appellant's participation in the robbery even though appellant was acquitted of the more serious charges of robbing the bank. See *United States* v. *Sweig*, *supra*, 454 F.2d at 184.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
May 21, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
JOHN L. CADEN,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976— 614—353—211

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of May 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Albert J. Brackley, Esq.
186 Joralemon Street
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
21st day of May 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-3618298
Qualified in Queens County
Term Expires March 30, 19 77